STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

TALF, INC. d/b/a THE INN AT UNIVERSITY VILLAGE ,

Respondent,
_____/

DOAH CASE NO. 15-7353
AHCA NO. 2015009032
FILE NO. 11966347
LICENSE NO. 10551
FACILITY TYPE: ASSISTED LIVING FACILITY

RENDITION NO.: AHCA-17-0063FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Lynne A. Quimby-Pennock, conducted a formal administrative hearing. At issue in this case is whether Respondent violated the requirements to demonstrate the financial ability to operate, and, if so, what penalty should be imposed. The Recommended Order dated November 16, 2016, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order, and Petitioner filed a response to Respondent's exceptions.

In determining how to rule upon Respondent's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency must follow section 120.57(1)(l), Florida Statutes, which provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law

> or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

§ 120.57(1)(l), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on Respondent's exceptions:

In its first exception (under the heading of "General Exceptions"), Respondent takes exception to: 1) the ALJ's alleged failure to address proposed findings and conclusions submitted by Respondent in its proposed recommended order; 2) the ALJ's alleged disregard of "relevant undisputed evidence"; 3) the ALJ's alleged "failure to recognize requirements for notice of non-compliance with opportunity to cure oversight"; and 4) the ALJ's alleged failure to consider appropriate criteria for imposing licensure revocation. Respondent also takes exception to the ALJ's alleged failure to accept proposed findings of fact, the ALJ's conclusions of law that were not based on competent, substantial evidence, and the ALJ's determination that the

Administrative Complaint sufficiently states a charge for licensure revocation. Respondent's first exception is non-compliant with the requirements of section 120.57(1)(k), Florida Statutes, in that it does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, and does not include appropriate and specific citations to the Record. Therefore, the Agency does not need to rule on it.

In its second exception, Respondent takes exception to Paragraph 3 of the Recommended Order, arguing that the findings of fact in that paragraph are not supported by competent, substantial evidence. With the exception of the last sentence, the findings of fact in Paragraph 3 of the Recommended Order are based on competent, substantial evidence. See Transcript, Pages 28-29 and 96. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). Since there is no competent, substantial evidence to support the ALJ's finding that University Inn is regulated by the Office of Insurance Regulation, the Agency must reject that finding of fact, along with Endnote 2 of the Recommended Order. Therefore, the Agency grants Respondent's second exception to the extent that Paragraph 3 of the Recommended Order is modified as follows:

> 3. University Inn conducts business at University Village, which is affiliated with Westport Holdings Tampa, LP (Westport). Westport holds a certificate from the Office of Insurance Regulation (OIR) to operate University Inn as part of a continuing care retirement community. ~~As such, University Inn is also regulated by the OIR.2/~~

In its third exception, Respondent takes exception to the second sentence of Paragraph 5 of the Recommended Order, arguing that there is no competent, substantial evidence to support

the ALJ's finding that "Westport is affiliated with the Center." The finding of fact in the second sentence of Paragraph 5 of the Recommended Order is based on competent, substantial evidence. See Transcript, Pages 28-29, 96, 98 and 151. Thus, the Agency is not at liberty to reject or modify it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's third exception.

In its fourth exception, Respondent takes exception to Paragraph 6 of the Recommended Order, arguing there is no competent, substantial evidence to support the ALJ's finding that Westport is affiliated with the The Nursing Center at University Village. Contrary to Respondent's argument, the findings of fact in Paragraph 6 of the Recommended Order are all supported by competent, substantial evidence. See Transcript, Pages 28-29, 96, 98 and 151. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's fourth exception.

In its fifth exception, Respondent takes exception to Paragraph 7 of the Recommended Order, arguing there is no competent, substantial evidence to support the ALJ's finding that "[t]he Center and University Inn are intertwined and the financial health of one affects the other." Contrary to Respondent's argument, the ALJ's finding at issue is a reasonable inference based on competent, substantial record evidence. See Transcript, Pages 29-30, 35-36, 60 and 102-103. Thus, the Agency may not disturb it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's fifth exception.

In its sixth exception, Respondent takes exception to Paragraph 15 of the Recommended Order, arguing the findings of fact in that paragraph are inaccurate and incomplete. Respondent's argument does not constitute a valid basis upon which the Agency can reject or modify findings of fact. The findings of fact in Paragraph 15 of the Recommended Order are

based on competent, substantial record evidence. See Transcript, Pages 176-178; Respondent's Exhibit O. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's sixth exception.

In its seventh exception, Respondent takes exception to Paragraph 16 of the Recommended Order, arguing the findings of fact in that paragraph are incomplete and fail to recite other undisputed evidence. Respondent's argument does not constitute a valid basis upon which the Agency can reject or modify findings of fact. The findings of fact in Paragraph 16 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Page 40. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's seventh exception.

In its eighth exception, Respondent takes exception to Paragraph 17 of the Recommended Order, arguing that the ALJ's finding contained therein is "misleading, incomplete and unsupported." The finding of fact in Paragraph 17 of the Recommended Order is based on competent, substantial evidence. See Transcript, Pages 45-48. Thus, the Agency is prohibited from rejecting or modifying it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's eighth exception.

In its ninth exception, Respondent takes exception to Paragraph 24 of the Recommended Order, arguing the non-final suspension order was not clear and convincing evidence to demonstrate Respondent's financial instability per section 408.810(8), Florida Statutes. Respondent is essentially arguing the ALJ erred in regard to an evidentiary issue. However, such issues fall outside of the substantive jurisdiction of the Agency. See Barfield v. Department of

Health, 805 So. 2d 1008 (Fla. 1st DCA 2002). Therefore, the Agency must deny Respondent's ninth exception.

In its tenth exception, Respondent takes exception to Paragraph 25 of the Recommended Order, arguing the ALJ's conclusion that "[p]roviding some of that information (which did not comply with the request) approximately seven months after it was requested" was a failure to provide the requested information is "incomplete, unsupported and contrary to undisputed evidence. The Agency respectfully disagrees. The ALJ's conclusions of law in Paragraph 25 of the Recommended Order are a reasonable interpretation of rule 59A-35.062, Florida Administrative Code. The Agency finds that, while it does have jurisdiction over the conclusions of law in Paragraph 25 of the Recommended Order since they involve an interpretation of the Agency's rules, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Respondent's tenth exception.

In its eleventh exception, Respondent takes exception to the ALJ's recommended penalty of revocation, arguing the Agency did not establish that Respondent violated any statute or rule providing for revocation, and that the penalty is improper and unreasonable. In regard to Respondent's arguments concerning the recommended penalty, the Agency can only increase or decrease a recommended penalty if it first reviews the complete record of the case and states with particularity its reasons for increasing or decreasing the recommended penalty by citing to the record. See § 120.57(1)(*l*), Fla. Stat.; Criminal Justice Standards and Training Commission v. Bradley, 596 So. 2d 661, 664 (Fla. 1992). The competent, substantial record evidence of this case demonstrates that Respondent did not comply the requirements of rule 59A-35.062(7), Florida Administrative Code. See Transcript, Pages 45-48. As the ALJ properly concluded, violating rule 59A-35.062(7), Florida Administrative Code, is grounds for revocation of

Respondent's license. See §§ 408.815(1)(c) and 429.14(1)(b), Florida Statutes (2015). Respondent presented no evidence to show that a lesser penalty should be imposed. As for Respondent's arguments concerning the applicability of §§ 408.813 and 429.19, Florida Statutes (2015), neither of those statutes are applicable to this matter because they deal with the imposition of fines, and the Agency did not seek the imposition of a fine in this matter. In addition, the Agency gave Respondent ample time to correct the violation, waiting nearly six months for Respondent to provide proof of financial ability to operate before it issued the Administrative Complaint in this matter, after it had already given Respondent a one-month extension in which to respond to the Agency's April 22, 2015 request to Respondent to provide proof of financial ability to operate. See Transcript, Pages 45 – 48; Petitioner's Exhibit A. The Agency's proposed penalty of revocation, which was upheld by the ALJ, is not unreasonable in light of those undisputed facts. Therefore, the Agency denies Respondent's eleventh exception.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order.

ORDER

1. The Agency's November 10, 2015 Administrative Complaint is hereby upheld as final, and Respondent's assisted living facility license is hereby revoked.

2. In order to ensure the health, safety, and welfare of the Respondent's clients, the revocation of the Respondent's license is stayed for 30 days from the filing date of this Final Order for the sole purpose of allowing the safe and orderly discharge of clients. § 408.815(6),

Fla. Stat. The Respondent is prohibited from accepting any new admissions during this period and must immediately notify the clients that they will soon be discharged. The Respondent must comply with all other applicable federal and state laws. At the conclusion of the stay, or upon the discontinuance of operations, whichever is first, the Respondent shall promptly return the license which is the subject of this agency action to the appropriate licensure unit in Tallahassee, Florida. Fla. Admin. Code R. 59A-35.040(5).

3. In accordance with Florida law, the Respondent is responsible for retaining and appropriately distributing all client records within the timeframes prescribed in the authorizing statutes and applicable administrative code provisions. The Respondent is advised of Section 408.810, Florida Statutes.

4. In accordance with Florida law, the Respondent is responsible for any refunds that may have to be made to the clients.

5. The Respondent is given notice of Florida law regarding unlicensed activity. The Respondent is advised of Section 408.804 and Section 408.812, Florida Statutes. The Respondent should also consult the applicable authorizing statutes and administrative code provisions. The Respondent is notified that the revocation of its registration may have ramifications potentially affecting accrediting, third party billing including but not limited to the Florida Medicaid program, and private contracts.

DONE AND ORDERED in Tallahassee, Florida, on this 19th day of January, 2017.

JUSTIN M. SENIOR, Interim Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of this Final Order was served on the below-named persons by the method designated on this 20th day of January, 2017.

RICHARD J. SHOOP, Agency Clerk
AGENCY FOR HEALTH CARE ADMINISTRATION
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308
Telephone: (850) 412-3630

Copies furnished to:

Jan Mills Facilities Intake Unit Agency for Health Care Administration (Electronic Mail)	Laura Manville, Unit Manager Assisted Living Unit Agency for Health Care Administration (Electronic Mail)

Finance & Accounting Revenue Management Unit Agency for Health Care Administration (Electronic Mail)	Pat Caufman, Field Office Manager Area 5/6 Field Office (Electronic Mail)
Katrina Derico-Harris Medicaid Accounts Receivable Agency for Health Care Administration (Electronic Mail)	John F. Loar, Esquire Broad and Cassel 215 South Monroe Street, Suite 400 Tallahassee, Florida 32301 (U.S. Mail)
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Honorable Lynne A. Quimby-Pennock Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, Florida 32399-3060 (Electronic Filing)	Thomas J. Walsh II, Esquire Andrew B. Thornquest, Esquire Assistant General Counsels (Electronic Mail)

NOTICE OF FLORIDA LAW

408.804 License required; display.--

(1) It is unlawful to provide services that require licensure, or operate or maintain a provider that offers or provides services that require licensure, without first obtaining from the agency a license authorizing the provision of such services or the operation or maintenance of such provider.

(2) A license must be displayed in a conspicuous place readily visible to clients who enter at the address that appears on the license and is valid only in the hands of the licensee to whom it is issued and may not be sold, assigned, or otherwise transferred, voluntarily or involuntarily. The license is valid only for the licensee, provider, and location for which the license is issued.

408.812 Unlicensed activity. --

(1) A person or entity may not offer or advertise services that require licensure as defined by this part, authorizing statutes, or applicable rules to the public without obtaining a valid license from the agency. A licenseholder may not advertise or hold out to the public that he or she holds a license for other than that for which he or she actually holds the license.

(2) The operation or maintenance of an unlicensed provider or the performance of any services that require licensure without proper licensure is a violation of this part and authorizing statutes. Unlicensed activity constitutes harm that materially affects the health, safety, and welfare of clients. The agency or any state attorney may, in addition to other remedies provided in this part, bring an action for an injunction to restrain such violation, or to enjoin the future operation or maintenance of the unlicensed provider or the performance of any services in violation of this part and authorizing statutes, until compliance with this part, authorizing statutes, and agency rules has been demonstrated to the satisfaction of the agency.

(3) It is unlawful for any person or entity to own, operate, or maintain an unlicensed provider. If after receiving notification from the agency, such person or entity fails to cease operation and apply for a license under this part and authorizing statutes, the person or entity shall be subject to penalties as prescribed by authorizing statutes and applicable rules. Each day of continued operation is a separate offense.

(4) Any person or entity that fails to cease operation after agency notification may be fined $1,000 for each day of noncompliance.

(5) When a controlling interest or licensee has an interest in more than one provider and fails to

license a provider rendering services that require licensure, the agency may revoke all licenses and impose actions under s. 408.814 and a fine of $1,000 per day, unless otherwise specified by authorizing statutes, against each licensee until such time as the appropriate license is obtained for the unlicensed operation.

(6) In addition to granting injunctive relief pursuant to subsection (2), if the agency determines that a person or entity is operating or maintaining a provider without obtaining a license and determines that a condition exists that poses a threat to the health, safety, or welfare of a client of the provider, the person or entity is subject to the same actions and fines imposed against a licensee as specified in this part, authorizing statutes, and agency rules.

(7) Any person aware of the operation of an unlicensed provider must report that provider to the agency.